No. 14,431

IN THE

United States Court of Appeals

For the Ninth Circuit

S. H. P. VEVELSTAD, WILLIAM L. PAPE, and AURORA NICKEL COMPANY, a corporation,

Appellants,

vs.

E. MILES FLYNN,

Appellee.

APPELLANTS' REPLY BRIEF.

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STATEMENT OF FACTS.

Appellants tried to, and believe they did, thoroughly and correctly state the pertinent evidence in their main brief, pp. 19-48, and submit that, although Appellee's Answer thereto in his brief, pp. 2-7, ignores the actual record and the factual evidence and begs the pertinency thereof, just as the learned trial Court did in its Opinion (PR 97), reiteration thereof herein in detail is unnecessary.

ARGUMENT.

Appellee throughout his brief cursorily dismisses Appellants' points, despite by what authorities they are supported, and in some instances practically

ignores them, i.e.: he asserts in his brief, p. 36, Appellants didn't argue whether Bohemia Basin Camp is a natural object or permanent monument. Of course, it doesn't make any difference which it is, if it was either which it was not; but Appellants' brief, pp. 61-64, was devoted entirely to that subject and that an unidentified cabin couldn't be inferred, as apparently the learned trial Court did, to be the Bohemia Basin Camp.

Pape's affidavit: This affidavit of January 13, 1954 (PR 109-112), was before the trial Court with Appellants' Motion for New Trial (PR 107-109). Appellants could not present it earlier because it wasn't made until January 13, 1954. Pape said (PR 109) he was employed by the United States, Navy Department, Military Sea Transport Service and, if he had not made the trip to Korea as required by the government, he would have lost his employment and seniority privileges with the United States. Appellants submit that Pape is at least inferentially corroborated by that Service's letter (PR 87-88), which says Pape was chief electrician aboard that Service's ships.

Appellants submit that Pape's duties of employment were paramount to his personal affairs—even a law-suit—and that the trial Court should have taken judicial notice thereof. Moreover, Pape's affidavit was not controverted by any sworn evidence other than Ward's affidavit (PR 78-81), which, in the light of his deceit of the Court, should have been looked upon with askance and discredited in the exercise of reasonable discretion.

Ward did not state therein (Appellee's Bf. p. 7) that Pape told him on June 20, 1953, that he would not be a witness for Appellants. Ward said (PR 78) Pape told him he would not be witness on the trial of any such action—referring to this action which Ward said he told Pape was about to be commenced. Pape under oath denied Ward's statement and said that he was definitely interested in being a witness at the trial and had important evidence to offer (PR 110).

Misabuse of Discretion. Appellee likewise dismisses (brief, pp. 20-26, p. 25), Appellants' argument in their brief, pp. 51-56, that the learned trial court had arbitrarily and capriciously abused its discretion, and entirely ignores Appellants' cited authorities and the trial Court's forcing two of the Appellants to trial, in the absence of the third, who the Court admitted was a material witness, unless they paid unspecified costs of $2700 (PR 88) or $2750 (PR 154), and that even under Rule 45(e)(1), FRCP (Bf., 51) the two Appellants couldn't have subpoenaed the third Appellant to attend the trial, and the rejection of Pape's deposition (Main Bf. p. 56), and attorney Ward's talk about the case and settlement thereof with Pape in the absence of the latter's counsel (PR 53-55), and the trial Court's abuse of discretion in not reserving decision until Pape's evidence could be adduced (PR 56), and in not informing Appellants' counsel when it informed Appellee's counsel that it would deny Appellants' Motion for Continuance (Main Brief, p. 56) and in disregarding that

Appellants Vevelstad and Company did not procure Pape's absence (PR 56). All these misabuses Appellee disregards without citing a single authority, but asserts in his brief, p. 25, "The Court did not have to give one bit of credence to Mr. Ward's affidavit to arrive at the conclusions expressed by the Court." Appellants submit that Ward's affidavit (PR 78-81) was the only sworn evidence, before the trial Court when it ordered Appellants to trial, that Pape had wilfully absented himself from the trial. Appellee still makes no denial of Appellants' charge (Bf., pp. 53-54) that Ward had deceived the Court as to his status as a practicing attorney. Appellants are not interested in Mr. Ward or as to his status as an attorney, but they submit that his deceit of the Court entitles no credit to his affidavit (PR 78-81) until it is at least corroborated by other creditable evidence, which it was not. Appellee's counsel Banfield has no personal knowledge other than what occurred in Juneau, and he didn't dispute Appellants' counsel Robertson's statements as to how the latter had tried to inform him and the learned trial Court that Appellants couldn't go to trial on December 14, 1953, because Appellant Pape would be absent in the Far East.

Appellants' *written* request (PR 93) for the Court to reserve its decision until Pape's evidence could be obtained stated that he would be available about January 16, 1954, not an indefinite date as asserted by Appellee (Bf., p. 27). Moreover, Appellants' written Motion For Continuance (PR 76-78) had been

and then was before the Court with its supporting affidavits by Vevelstad (PR 82-83) and Robertson (83-87) as well as the Military Sea Transportation Service's letter (PR 87-88).

Appellee didn't corroborate his witness Harrigan.

Appellee's witness Harrigan was on Yakobi Island from 7:20 a.m. to 4:40 p.m., May 14, 1953 (PR 672), and then only, and did not go over all the claims, probably not all of any one claim, being limited to travel by snow conditions (PR 665). He testified, knowing that Pape was unavailable to contradict him. Pape in his deposition, which the trial Court rejected, refuted all of Harrigan's testimony. Strangely enough Appellee himself never testified about these purported transactions and conversations between Harrigan and Pape, although Harrigan said Flynn accompanied them (PR 653-656), and Pape also said so in his rejected deposition (PR 405-417).

Appellee says (Bf., p. 56) Harrigan and Klein were two of his witnesses who proved that the ground was open to location by Flynn, but Harrigan was not on Yakobi Island until May 14, 1953 (PR 672) and Klein not until November 25 to 28, 1953, and then only to check blazes (PR 678), whereas Appellee claims he made his locations in the fall of 1952, nor was Appellee's witness Johnson on Yakobi Island until 1953.

Appellee says (Bf., p. 5) that Johnson prepared the map, Exhibit 1. Johnson said he hadn't seen that map until it was produced in court, that it was

not complete; that the draftsmen failed to put "all the things in there," (PR 188), also that he didn't place the descriptions on the map according to location notices; didn't amend the location notices; didn't follow the location notices when they were on the ground (PR 200-201). He had said priorily it was prepared in the office (neither place where nor draftsman's name being stated) from field-notes made by himself, Stahl and Kenniston in November and December, 1953 (PR 166), Stahl having measured the greatest share of the claims helped by Breseman, Kenniston being also along (PR 197). Significantly Appellee did not call Stahl, Breseman, or Kenniston as witnesses. Also, see Breseman's affidavits (PR 114-115; 116-118), which were before the learned trial Court on Appellants' Motion for New Trial (PR 107-109, also, see PR 118).

Appellants nowhere claimed that they relocated their claims in 1952, as stated by Appellee (Bf., p. 5). They proved that they made amended locations in June, 1953 (PR 540-543; Appellants' Exhibit J).

Appellants did not gamble, as asserted by Appellee (Bf. 9), that the trial would not occur on December 14 or 15, 1953, but commenced on October 2, 1953, to inform the trial Court and Appellee's counsel and thence forward at various times that they could not go to trial on December 14, 1953, because Appellant Pape, a material witness as admitted by the learned trial Court, could not be present at that time (Main Bf., 14-19).

Appellee took Pape's deposition for discovery purposes; in fact, the learned trial Court erroneously ruled it was inadmissible on that ground (PR 99). Appellants could not properly on cross-examination therein develop their case in chief. Moreover, that deposition was taken nearly a month before Appellants were surprised by the trial Court, over their objections that Appellant Pape would not be available and could not be in attendance, setting the case for trial on December 14, 1953.

Appellants Vevelstad and Company could not subpoena Appellant Pape under Rule 45(e)(1), FRCP, as stated (Main Bf., p. 51).

It should be noted that Vevelstad testified he checked and found all of Pape's claims, also on the ground all of Pape's discoveries which he had made (PR 564).

Appellee dismisses in his brief, p. 57, Appellants' contention that the learned trial Court failed to require Appellee to sustain the burden of proof (Appellants' Main Bf., pp. 79-82), saying "There is nothing in the Court's opinion (PR 97-106) from which it can be inferred that the Court did not then thoroughly understand the burden of proof was on appellee." Appellants have no clairvoyance to know the learned trial Court's "understanding", but they submit that its Opinion and the entire record and factual evidence show that it placed the burden of proof upon Appellants, not upon Appellee as it should have.

Strength of Title: Appellee similarly dismisses (Bf., pp. 59-60), without citation of any authority and in entire disregard of the factual evidence, including Vevelstad (PR 540) and Harold Hofstad (PR 488-489), Appellants' contention (Main Brief, pp. 79-82) that the trial Court did not require Appellee to rely upon the strength of his own title. Three of his referred to witnesses were apparently Johnson, Harrigan, and Klein, none of whom were on Yakobi Island until 1953, some 6 months or more after Appellee's alleged locations. To paraphrase Appellee, it is absurd and ridiculous to contend that a person can go into a wilderness, forested, mountainous country like Yakobi Island and honestly testify that any particular area was open to location as a mining claim six or more months before he arrived on the scene.

In any event, as Appellee apparently concedes, he had the burden of proof, and also he was obliged to rely on the strength of his own title, so it doesn't make any difference what title Appellants had inasmuch as Appellee failed to prove he had title or was even qualified to locate mining claims in Alaska.

Without citation of authority, Appellee dismisses (Bf. pp. 60-61) Appellants' contention that Appellee should have been required to prove the extent of conflict between Appellants' claims and his claims (PR 720). Appellee alleged the conflict without describing it in his complaint (PR 7) and in his Amended Complaint (PR 60), nor did he ever prove it. Appellants still don't know, except by the trial Court's

erroneous decree (PR 119-122), with which of Appellee's purported claims their claims conflict.

Appellee ignores (Bf., pp. 61-66) Appellants' contention, not that they have the right to attack Appellee's non-American citizenship, but that he voluntarily, for some unknown reason, disqualified himself to locate and hold title to mining claims in Alaska by volunteering, not at Appellants' suggestion or question, that he was a Canadian citizen (PR 265).

Appellants never have contended, and they don't now, that they can affirmatively challenge Appellee's non-American citizenship, but they do contend that when Appellee himself voluntarily proved he is a Canadian citizen, he thereby disqualified himself as being able to locate and hold the title to mining claims in Alaska, and that this Honorable Court's decision in *Vedin v. McConnell,* 22 F. 2d 753, 758, supports that conclusion.

Appellee summarily dismissed (Bf. pp. 66-67) Appellants' contention (Bf. 85) that the judgment was contrary to the law and the preponderance of the evidence, but ignores all of Appellants' evidence, including Vevelstad's (PR 564) that he checked and found all of Pape's claims, also all of Pape's discoveries which he had made on the ground.

Appellants submit that their main brief sufficiently answers Appellee's other points, and that to discuss all of Appellee's fallacious arguments and inattentions to the actual record and factual evidence would indefinitely lengthen this reply.

Wherefore, Appellants submit it and their main brief in support of their contention that their points are meritorious and that the learned trial court did commit the many instances of arbitrary and capricious misabuses of discretion as they contend and that the judgment should be reversed and set aside and Appellee's action dismissed.

Dated, Juneau, Alaska,
February 22, 1955.

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Attorneys for Appellants.